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A Comparative Analysis Of Judicial Selection Methods In Tennessee And Kentucky: Appointed V. Elected

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A COMPARATIVE ANALYSIS OF JUDICIAL SELECTION METHODS IN TENNESSEE AND KENTUCKY: APPOINTED V. ELECTED

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ABSTRACT

This thesis explores the relationship between judicial independence and judicial accountability by investigating the question of how selection methods shape state appellate court decisions. I conducted a case study using the states of Tennessee and Kentucky and the judicial selection methods of appointments and elections. I then conducted a sample of cases and did a comparative quantitative analysis of reversal records between the two states in the hopes of finding a statistical difference from my research. The debate between judicial selection methods is not a simple question and this thesis alone cannot provide the answer, but I hope that my research can provide useful data for future research so that state policy makers can make a responsible decision and resolve the conflict.

Keywords: Judicial Selection Methods, Appointments, Elections, Tennessee, Kentucky, Case Study

Dedicated to Grandfather

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CHAPTER 1

INTRODUCTION

The judiciary branch has been rife with controversy since its beginning in 1776 when the founding fathers granted neither the power of the sword nor the power of the purse to the third branch, but rather placed its fragile basis for power and authority in the tumultuous hands of the public.[1] Thus in modern times, the independence and accountability of the judiciary directly affect the public confidence in the courts so greatly that the "very existence of the rule of law is dependent on public confidence because the public will not support institutions in which they have no confidence."[2] This thesis explores the relationship between judicial independence and judicial accountability by investigating the question of how selection methods shape state appellate court decisions. The research is organized into three sections that address the relationships between selection methods and judicial decision-making. The first section provides a discussion of the strengths and weaknesses associated with judicial elections and the judicial appointment process. The second section describes the historical evolution of the judicial selection process in the states of Kentucky and Tennessee. The third section uses quantitative analysis to compare appellate court decisions in Kentucky and Tennessee.

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[1] Frances Kahn Zemans, "The Accountable Judge: Guardian of Judicial Independence," *Southern California Law Review* (Southern California Law Review), no. 75 (1999). 625.

[2] Kelly J. Varsho, "In the Global Market for Justice: Who is Paying the Highest Price for Judicial Independence?," *Northen Illinois University Law Review* (Board of Regents, for Northern Illinois University), no. 27 (Summer 2007): 455.

The conclusion of the paper reports the findings of the analysis and suggests how these findings may affect the judicial selection process.

CHAPTER 2

CRITIQUE OF JUDICIAL ELECTIONS

Judicial elections in the US began with the rise of the Jacksonian democracy in the early nineteenth century along with the rise of suspicion that aristocracy dominated the bench.[3] President Jackson notoriously referred to judges as "politicians who hide their policies under their robes" and advocated greater accountability in the judiciary to the public through elections.[4] The same sentiment holds true today that the "virtues that make a person a good judge are not usually the same virtues that make a good politician."[5] However, in today's society judges are often believed to be policy makers and "like all policymakers in a democracy, …[justices] must retain their posts in order to achieve their policy goals."[6] Through the electoral selection process justices are forced into the increasingly politically charged atmosphere of campaigning; which one state

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[3] Bradley C. Canon, "Judicial Election and Appointment at the State Level: Commentary on State Selection of Judges," *Kentucky Law Journa* (Kentucky College of Law), no. 77 (1989): 748.

[4] Kelly J. Varsho, "In the Global Market for Justice: Who is Paying the Highest Price for Judicial Independence?," *Northen Illinois University Law Review* (Board of Regents, for Northern Illinois University), no. 27 (Summer 2007): 449

[5] Marie A. Failinger, "Can a Good Judge Be a Good Politician? Judicial Elections from a Virtue Ethics Approach," *Missouri Law Review* (Curators of the University of Missouri), Spring 2005. 435

[6] Neal Devins and Nicole Mansker, "The Judiciary and The Popular Will: Public Opinion and State Supreme Courts," *University of Pennsylvania of Constitutional Law* (University of Pennsylvania Constitutional Law) 13 (December 2010). 470.

Supreme Court justice once described as having "never felt so much like a hooker down by the bus station in any race [than he] did in a judicial race."[7]

In this critique of the judicial selection process of elections there are three main points of dissent: campaigns, improper influences on judicial conduct, and judicial accountability.

Election campaigns have become "nastier, noisier, and costlier" resulting in a judiciary dependent upon the public and strained by the "sword of popular opinion hanging over their necks…" Judiciaries have become subject to highly politicized and expensive campaigns, heightened scrutiny, and an unpredictable public.[8] The nature of elections and campaigns has blurred the very line that separates the judiciary from political actors, which is that judges are not representatives; they do not serve any constituency or aim to advance the interests of any particular community. Furthermore, judges are intended to be insulated from outside influences such as political action groups and campaign money, while political actors are rewarded for advancing particular interests through their work and let public opinion dictate their decisions.[9] Former California Supreme Court Justice Otto Kaus described the pressures that come with judicial campaigning as similar to "finding a crocodile in your bathtub when you go in to

[7] Neal Devins and Nicole Mansker, "The Judiciary and The Popular Will: Public Opinion and State Supreme Courts," *University of Pennsylvania of Constitutional Law* (University of Pennsylvania Constitutional Law) 13 (December 2010). 490.

[8] Kelly J. Varsho, "In the Global Market for Justice: Who is Paying the Highest Price for Judicial Independence?," *Northen Illinois University Law Review* (Board of Regents, for Northern Illinois University), no. 27 (Summer 2007): 445.

[9] Kelly J. Varsho, "In the Global Market for Justice: Who is Paying the Highest Price for Judicial Independence?," *Northen Illinois University Law Review* (Board of Regents, for Northern Illinois University), no. 27 (Summer 2007): 456.

shave in the morning. You know it's there, and you try not to think about it, but it's hard to think about much else."[10]

Judicial campaigns have grown so ugly that both the public and the judiciary branch believe those with money can buy justice.[11] The notion that there is a "price tag put on a seat behind the bench" is only strengthened by the alarming rate at which campaigns and campaign contributions have grown over the past two decades, in some cases even up to a 320% increase.[12] Even the most decent and honest judicial candidates have been turned into "junkies…caught in the political equivalent of an arms race in which neither side feels safe to disarm unilaterally because each candidate lives in mortal fear" that they need the contributions to ensure an electoral victory.[13]

USA Today and Gallup found through polling that 89 percent of those surveyed believed the influence of campaign contributions on judges' rulings is a problem, and that 90 percent felt judges should be removed from a case if it involves a contributor.[14] A survey of Texas judges stated that 48 percent confessed that they believed money had an

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[10] Deborah Goldberg, "Public Funding of Judicial Elections: The Roles of Judges and the Rules of Campaign Finance," *Ohio State Law Journal* (Ohio State Law Journal) 64 (2003). 98

[11] Kelly J. Varsho, "In the Global Market for Justice: Who is Paying the Highest Price for Judicial Independence?," *Northen Illinois University Law Review* (Board of Regents, for Northern Illinois University), no. 27 (Summer 2007): 472

[12] Jason Miles Levien and Stacie L. Fatka, "Cleaning Up Judicial Elections: Examining the First Amendment Limitations On Judicial Campaign Regulation," *Michigan Law & Policy Review* (University of Michigan Law School) 2 (1997). 76

[13] James Sample, "Democracy At The Corner of First And Fourtheenth: Judicial Campaign Spending And Equalityy," *New York University Annual Survey of American Law* (New York University Annual Survey of American Law) 66 (2011). 736

[14] Buck Lewis, "It's a Mighty Short Drive from the Harman Mine to the Tennessee Line," *Tennessee Bar Journal* (Tennessee Bar Journal Association, Inc), April 2009. 3

impact on judicial elections.[15] Another study found that Ohio justices routinely sat on cases after having received campaign contributions from the parties involved, and that they then voted in favor of those contributors 70 percent of the time; one justice voted in favor of his contributors 91 percent of the time.[16]

Avery v. State Farm heard in the Illinois Supreme Court in 2003 is a prime example of pending high-stakes litigation and big-money campaigns. The case, which had over 1 billion dollars at stake, was pending its appeal during the judicial elections. The combined campaigns of the two candidates running for the open seat in a rural single district exceeded 9.3 million dollars, which was close to double the previous national record for state judicial elections. The victorious candidate had been supported by 350,000 dollars through direct contributions of various persons involved with State Farm and its pending appeal, in addition to one million dollars from larger groups that State Farm was affiliated with. The judge almost immediately upon taking the bench then cast a tie-breaking vote "nixing" the 456 million dollar claim against State Farm. "The juxtaposition of gigantic campaign contributions and favorable judgments for contributors creates a haze of suspicion over the highest court in Illinois…although [the justice] [was] an intelligent and no doubt honest man, the manner of his election will cast

[15] Mark A. Behrens and Cary Silverman, "The Case For Adopting Appointive Judicial Selection Systems For State Court Judges," *Cornell Journal of Law and Public Policy* (Cornell University) 11 (Spring 2002). 283

[16] James Sample, "Democracy At The Corner of First And Fourtheenth: Judicial Campaign Spending And Equalityy," *New York University Annual Survey of American Law* (New York University Annual Survey of American Law) 66 (2011). 750

doubt over every vote he casts."[17] Perception in this instance is as important as reality; if voters believe that donors call the shots, they will be less willing to take part in democratic governance, and confidence in the judicial system will be eroded.[18]

The "unavoidable truth" is that the most frequent contributors to judicial campaigns are lawyers; law firms; and entities like businesses, unions, and special interest groups that are likely to appear in court before judges they helped to elect.[19] Lawyers in particular have stood out as one of the biggest group of contributors to campaigns because of the inevitable pressure that their success and livelihood depends on their ability to gain favorable rulings.[20] However, this should not prove surprising because it is only logical that those who have the most at stake and the most to lose would take a greater interest than those who have no personal or professional investment on the line.

There are many arguments against judicial elections, but there are many ardent supporters who feel elections are the most democratic and fair selection method. No

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[17] James Sample, "Democracy At The Corner of First And Fourtheenth: Judicial Campaign Spending And Equalityy," *New York University Annual Survey of American Law* (New York University Annual Survey of American Law) 66 (2011). 754

[18] Shirley S. Abrahamson, "Speech: The Ballot and The Bench," *New York University Law Review* (New York University Law Review) 76 (October 2001). 995

[19] Shira J. Goodman, Lynn A. Marks and David Caroline, "What's More Important: Electing Judges or Judicial Indepence? It's time for Pennsylvania to Choose Judicial Independence," *Duquesne Law Review* (Duquesne University) 48 (Fall 2010). 864

[20] Jason Miles Levien and Stacie L. Fatka, "Cleaning Up Judicial Elections: Examining the First Amendment Limitations On Judicial Campaign Regulation," *Michigan Law & Policy Review* (University of Michigan Law School) 2 (1997). 77

system is without its flaws or room for improvement as seen with the equally adamant arguments for and against appointment methods.

CHAPTER 3

CRITIQUE OF JUDICIAL APPOINTMENTS

The judicial appointment system that will be analyzed in this thesis is that of merit selection, also known as the "Missouri Plan". This system arose from the rising skepticism of reformers in the 1940's that voters could not distinguish "able judicial candidates from mediocre ones."[21] This skepticism was due in part to the political machines that were dominating the local selection of judges, which Roscoe Pound criticized in his address, The Causes of Popular Dissatisfaction with the Administration of Justice; of "putting courts into politics,… compelling judges to become politicians, [and] …almost destroy[ing] the traditional respect for the bench."[22] The original merit selection plan was then designed by Albert Kanes as a means to "alleviate the problems afflicting the courts" and was endorsed by the American Judicature and the American Bar Association and first instituted in Missouri in 1940.[23] Merit selection plans now differ

[21] Bradley C. Canon, "Judicial Election and Appointment at the State Level: Commentary on State Selection of Judges," *Kentucky Law Journa* (Kentucky College of Law), no. 77 (1989): 749

[22] John D. Fabian, "The Paradox of Elected Judges: Tension in the American Judicial System," *Georgetown Journal of Legal Ethics* (Georgetown Journal of Legal Ethics) 15 (Fall 2001). 166.

[23] G. Alan Tarr, "Retention Elections in a Merit-Selection System: Balancing the Will of the Public with the Need for Judicial Independence and Accountability: Do Retention

according to different states but the general construct is comprised of three main parts. The first component is a nonpolitical nominating commission that selects judicial candidates based on their competency for office. Second, an appointing authority, such as a chief justice or governor, chooses one of the candidates from the submitted list and appoints the person to the judicial vacancy. The final step in the merit selection process occurs often many months even up to two years after the initial appointment, when the newly appointed judge must run in a noncompetitive, nonpartisan retention election after serving the aforementioned set term on the bench.[24]

The primary criticism of the merit selection method is that it "moves politics to the backroom" and deprives the public of their fundamental right to vote and select judges as they do other political leaders.[25] Not only do judicial appointments restrict voter's rights, but they also restrict candidates who could seek a position on an appellate court to the few selected by the judicial nominating commission.[26] For both of these

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Elections Work?," *Missouri Law Review* (Curators of the University of Missouri) 74 (Summer 2009). 609.

[24] James J. Alfini and Jarrett Gable, "The Role of the Organized Bar in State Judicial Selection Reform: The Year 2000 Standards," *Dickinson Law Review* (Dickinson School of Law), no. 106 (Spring 2002). 690

[25] Sr. Judge Peter Paul Olszewski, "Who's Judging Whom? Why Popular Elections are Preferable to Merit Selection Systems," *Penn State Law Review* (Dickinson School of Law) 109 (Summer 2004). 2

[26] Brian T. Fitzpatrick, "Essay: Election As Appointment: The Tennessee Plan Reconsidered ," *Tennessee Law Review* (Tennessee Law Review Association, Inc), no. 75 (Spring 2008): 473.

reasons judicial appointments are criticized for being undemocratic and often seen as "a masquerade to put political power in the hands… of the elite."[27]

Judicial appointments are also considered a threat to judicial independence and accountability but for different reasons that judicial elections. Appointed judges are accused of responding far less to the will of the public and more to the will of the governor or legislature that appointed them, giving them the perception of being elitist and too isolated from public opinion.[28] Such as when California Governor Gray Davis flat out stated in response to questions regarding his recent judicial appointments that he expected his judicial appointees "to more or less reflect [his] views…expressed during his own election campaign or resign."[29]

Although advocates of merit selection appointments argue that it is a less political process, critics disagree claiming that politics actually play a large role in the selection of committee members as well as the commission's deliberation process.[30] Commissions are also accused of using unfair tactics to choose candidates such as "panel stacking" when a nominating commission's list of nominees is fixed so that there is no real choice for the

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[27] G. Alan Tarr, "Retention Elections in a Merit-Selection System: Balancing the Will of the Public with the Need for Judicial Independence and Accountability: Do Retention Elections Work?," *Missouri Law Review* (Curators of the University of Missouri) 74 (Summer 2009). 610.

[28] Neal Devins and Nicole Mansker, "The Judiciary and The Popular Will: Public Opinion and State Supreme Courts," *University of Pennsylvania of Constitutional Law* (University of Pennsylvania Constitutional Law) 13 (December 2010). 483

[29] Shirley S. Abrahamson, "Speech: The Ballot and The Bench," *New York University Law Review* (New York University Law Review) 76 (October 2001). 988.

[30] Sr. Judge Peter Paul Olszewski, "Who's Judging Whom? Why Popular Elections are Preferable to Merit Selection Systems," *Penn State Law Review* (Dickinson School of Law) 109 (Summer 2004). 9

appointing authority to make, and "logrolling" when individual commission members cut deals with other commission members to support their respective nominees.[31]

There are pros and cons to each side of the judicial selection battle that is raging within state governments. However, the longer it continues the more controversy will arise and further weaken the public's trust in the judiciary branch. The aforementioned controversies that arise from elections as well as appointments chip away at the judiciary's most valuable asset of its independence. Some argue that judicial independence can be divided into two separate concepts of decisional and institutional independence; decisional independence is a judge's ability to decide cases free from improper influences, based solely on the law and applicable facts whereas institutional independence is insularity from the other political branches of government and therefore being free to decide cases without fear of retribution from the executive or legislative branches.[32]

It has become so deeply embedded in the "American psyche… that judicial independence [is]…the backbone of the American democracy, the bulwark of the Constitution, and an indispensable element of our constitutional framework."[33] However, the public, as well as, members of the judiciary feel that this promise of candor and

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[31] Sr. Judge Peter Paul Olszewski, "Who's Judging Whom? Why Popular Elections are Preferable to Merit Selection Systems," *Penn State Law Review* (Dickinson School of Law) 109 (Summer 2004). 9

[32] Kelly J. Varsho, "In the Global Market for Justice: Who is Paying the Highest Price for Judicial Independence?," *Northen Illinois University Law Review* (Board of Regents, for Northern Illinois University), no. 27 (Summer 2007): 450

[33] John D. Fabian, "The Paradox of Elected Judges: Tension in the American Judicial System," *Georgetown Journal of Legal Ethics* (Georgetown Journal of Legal Ethics) 15 (Fall 2001). 155.

justice is not being met, and that the root of the controversy surrounding the integrity and quality of judiciary members stems from a common source of malcontent: judicial selection methods.

Both elections and appointments create cause for concern in the eyes of the public as judicial independence and accountability is called into question regarding different aspects of both selection processes. Whichever way it is cut, judicial independence is vital to the court's stability as an institution and cannot afford to be compromised; which is why the sooner the debate over selection methods is resolved the sooner confidence and stability in the courts will return. However, there is much to learn from the history of the judicial branch and judicial selection methods of both Tennessee and Kentucky. Both states have their reasons for their current selection method based on their own unique histories that is a strong argument when considering such a large potential policy shift.

CHAPTER 4

HISTORY OF JUDICIAL BRANCH AND JUDICIAL SELECTION IN TENNESSE

The first Tennessee constitution, ratified in 1796 when Tennessee became the nation's sixteenth state, granted judges life tenure "so long as they exhibited 'good behavior' and placed the power to select those judges exclusively in the hands of the state legislature."[34] Tides changed in the nineteenth century when Tennessee's very own Andrew Jackson spearheaded the populist movement for democracy the will of the common man to be heard equally as loud as the socially and politically elite.[35] When Tennessee first tried to adopt selection of judges at its second Constitutional Convention in 1834 however, the proposal failed and was not approved as a constitutional amendment until nineteen years later under the condition that judges would "be elected by the qualified voters" to limited terms of eight years.[36] The next change in judicial selection methods would not come until over one hundred years later in 1971 with the appointment based merit selection plan aptly referred to as "The Tennessee Plan."[37]

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[34] Brian T. Fitzpatrick, "Essay: Election As Appointment: The Tennessee Plan Reconsidered ," *Tennessee Law Review* (Tennessee Law Review Association, Inc), no. 75 (Spring 2008): 477.

[35] Brian T. Fitzpatrick, "Essay: Election As Appointment: The Tennessee Plan Reconsidered ," *Tennessee Law Review* (Tennessee Law Review Association, Inc), no. 75 (Spring 2008): 477.

[36] IBID

[37] IBID

The initiative in Tennessee for a change in the judicial selection process came largely from professional lawyer organizations that wanted to remove the politics from process of elections because for much of the post-Civil War era, Tennessee was a one-party state; thus, whichever candidate was nominated by the Democratic Party was all but certain to win a judgeship.[38] The election system in place was hardly democratic because most judges in Tennessee were elevated to the bench after 1853 not by election, but by gubernatorial appointment to fill interim vacancies; so much so that 60 percent of justices who had served on the Tennessee Supreme Court during the first 100 years of elections were appointed by the governor.[39]

The Plan in 1971 originally called for all "vacancies" on the intermediate appellate courts and Supreme Court to be filled by the governor.[40] However, The Plan described "vacancies" not only as interim vacancies, i.e.,. instances where a judge left in the middle of an eight-year term, but also as instances where the judge completed an eight-year term and did not run for reelection; which essentially required the governor to initially appoint all judges on the intermediate appellate courts and the supreme court.[41]

The Plan remains intact today, but a few key revisions were made such as in 1974, when the legislature amended the Plan to revoke its applicability to vacancies on

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[38] IBID, 473.

[39] Brian T. Fitzpatrick, "Essay: Election As Appointment: The Tennessee Plan Reconsidered ," *Tennessee Law Review* (Tennessee Law Review Association, Inc), no. 75 (Spring 2008): 473.

[40] Tenn. Code Ann. § 17-712 (1972)

[41] Brian T. Fitzpatrick, "Essay: Election As Appointment: The Tennessee Plan Reconsidered ," *Tennessee Law Review* (Tennessee Law Review Association, Inc), no. 75 (Spring 2008): 473.

the Supreme Court.[42] Not until 20 years later would the legislature add the court back on in 1994, creating a large window when elections were still held for judges.[43]

The legislature has also adjusted the nominating commission that supplies the list of names from which the governor must appoint judges.[44] Although legislators no longer serve on the commission, the two speakers of the legislature select all seventeen members. Fourteen members must be lawyers, leaving only three non-lawyers. Twelve of the fourteen lawyer members must come from names supplied by five special lawyers' organizations. Two members must be taken from names submitted by the Tennessee Bar Association, one from the Tennessee Defense Lawyers Association, three from the Tennessee Trial Lawyers Association, three from the Tennessee District Attorneys General Conference, and three from the Tennessee Association of Criminal Defense Lawyers. The two remaining lawyer members need not be taken from one of these groups.[45]

Tennessee still uses its unique merit selection appointment system, as its judicial selection process, which was reaffirmed in 2009, so therefore will continue to be used. The current Tennessee judiciary is composed of three appellate courts--the supreme court, court of appeals, and court of criminal appeals; four trial courts of general

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[42] 1974 Tenn. Pub. Acts, ch. 433, § 1

[43] Brian T. Fitzpatrick, "Essay: Election As Appointment: The Tennessee Plan Reconsidered ," *Tennessee Law Review* (Tennessee Law Review Association, Inc), no. 75 (Spring 2008): 473.

[44] Brian T. Fitzpatrick, "Essay: Election As Appointment: The Tennessee Plan Reconsidered ," *Tennessee Law Review* (Tennessee Law Review Association, Inc), no. 75 (Spring 2008): 473.

[45] IBID

jurisdiction--the chancery court, circuit court, probate court, and criminal court; and three courts of limited jurisdiction--the juvenile court, general sessions court, and municipal court.[46]

[46] *Judicial Selection of States: Tennessee*, 2011, http://www.judicialselection.us/judicial_selection/index.cfm?state=TN.

CHAPTER 5

HISTORY OF JUDICIAL BRANCH AND JUDICIAL SELECTION IN KENTUCKY

The first constitution of Kentucky commenced on June 1, 1792 and followed the federal example to make no attempt to rigidly dictate a certain format, but rather empowered the legislature to outline the detailed pattern of organizational structure, to determine the necessary number and proper allocation of judges, and to define and alter the jurisdiction of the courts.[47] After the US Supreme Court established judicial review in the case of *Marbury v. Madison* however, many Kentuckians were unsure of whether it was sound doctrine and grew resentful of the courts; particularly the state legislature who "denounced the judges as usurpers, tyrants, and kings."[48]

The conflict came to a head in 1824 when the legislature passed an act entitled "An Act to Reorganize the Court of Appeals", the measure was signed off by the governor and ineffectively attempted to abolish the constitutional "old court" with a legislative "new court."[49] Strangely, both courts held sessions with come circuit judges "recognizing the one and some as the other true court, while several alternately

[47] William E. Bivin, "Historical Development of the Kentucky Courts ," *Kentucky Law Journal*, no. 47 (1959): 467.
[48] IBID 478.
[49] IBID 478.

recognized both."[50] The matter was finally resolved with the public at the 1850 constitutional convention where the third constitution resulted in an extreme measure of almost all public offices being elected, after 50 years of the Governor holding the power to appoint most public officials for lifetime tenure.[51]

At this time public opinion strongly believed that "ultimate sovereign [were] the freemen of the State at the polls" and this belief has been stood firm throughout the years with the Kentucky judicial selection system as a testament to that belief, as it has not changed significantly since the 1850 constitutional convention.[52] The only other significant change occurred in 1976 with a revision of the judicial article that created a unified court system known as the court of justice and established nonpartisan elections for judges.[53]

The current Kentucky judiciary consists of a Supreme Court, court of appeals, circuit court, and district court. Judges of the Supreme Court, court of appeals, and circuit court are elected to eight-year terms, and district court judges are elected to four-year terms, but if a mid-term judicial vacancy occurs, the governor appoints a replacement from a list submitted by a judicial nominating commission.[54]

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[50] William E. Bivin, "Historical Development of the Kentucky Courts ," *Kentucky Law Journal*, no. 47 (1959): 479.
[51] IBID 483.
[52] "Sketch of the Court of Appeals," in *History of Kentucky* (Genealogical Publishing Company, 1998). Pg 498.
[53] *Judicial Selection in the States: Kentucky*, 2011, http://www.judicialselection.us/judicial_selection/index.cfm?state=KY.
[54] *Judicial Selection in the States: Kentucky*, 2011, http://www.judicialselection.us/judicial_selection/index.cfm?state=KY.

CHAPTER 6

ANALYTICAL REASONING FOR RESEARCH

The purpose of my research on this issue is to the answer the question "Is the quality and independence of a state's judiciary affected by the manor of a judicial selection?" This is an important question because when answered it will have significant implications for not only Tennessee and Kentucky but for other states in similar situations. The national average for state reversal rates is 32 percent, which creates a benchmark for this case study.[55] If a state has a reversal rate significantly higher than the national average than that would "imply high trial court error rates…[and] troublingly high rates of appellate court and trial court disagreement", as well as incorrect rulings by sitting judges.[56] If a state has a reversal rate significantly lower it would imply greater consistency within the court system as well as high rates of more sound rulings.

State legislators, social and political leaders as well as voters are looking for answers to this question. Not necessarily specifically between Kentucky and Tennessee, but for what that would mean for their states and their counties when elections or appointments roll around. By determining either a similarity or dissimilarity another small piece will fall into place. Do appeal records reveal quality of judicial decisions and

[55] Theodore Eisenberg and Michael Heise, "Plaintiphobia in State Courts? An Empirical Study of State Court Trials on Appeal," *Cornell Law Faculty Publications* (January 1, 2009). Pg 137.
[56] Theodore Eisenberg and Michael Heise, "Plaintiphobia in State Courts? An Empirical Study of State Court Trials on Appeal," *Cornell Law Faculty Publications* (January 1, 2009). Pg 138.

thereby the quality of persons and as an even further extension quality of judicial selection processes? That is why I have chosen this research question, because regardless of the outcome of the data analysis the question will be answered and provide useful results to others who are conducting their own research or making decisions for their community and country.

I became personally interested in this topic a few years ago when I took a course on the judicial process and learned about the intricacies within the federal judicial system. However, I thought it was interesting that all federal judges are selected by appointment while state judges have such variety in their different judicial selection methods. I especially became interested in Tennessee and Kentucky because they are so similar regarding their population size, geographical location, and because I have personally experienced the political atmosphere from living in both states.

CHAPTER 7

METHODS

In this study, I compare affirmed and reversal records for appellate court decisions in the states of Kentucky and Tennessee. These two states prove to be good cases for comparison because they have similar population sizes and are located in similar geographic regions and they share social, cultural and economic conditions. Where they differ substantially is in the selection methods for judges: Kentucky selects judges through elections and Tennessee selects through appointments. By analyzing reversal and affirmation rates from systems that select judges differently, the analysis hopes to identify the advantages and disadvantages of the two.

Originally I had planned on comparing the records of every case for the past ten years in both states, but after much searching I finally came to the conclusion that such a record does not exist. Neither the courts in Kentucky nor in Tennessee keep track of their reversal records. I was also surprised to find that Kentucky did not even have its own research department to keep track of any other kinds of data over the years. Tennessee had a small research department but their records were minimal and they only started keeping electronic records within the past 10 years.

The Kentucky Supreme Court office sends all their records out to an independent organization called the National Center for State Courts. This group "is an independent, nonprofit court improvement organization founded at the urging of Chief Justice of the

Supreme Court Warren E. Burger. He envisioned NCSC as a clearinghouse for research information and comparative data to support improvement in judicial administration in state courts."[57] It was from a senior analyst at this group that I was informed that the only way to obtain the records of reversed and overturned cases was to read each case individually and retrieve my own data. Neither state court system could provide me with the raw data, so once again I turned to the National Center for State Courts who then sent me their data regarding how many cases were filed and heard in each state. The records I was provided with stopped after the year 2007 so my research is based off of cases between 2000 and 2007 covering a seven-year time period.

The number of cases heard over so many years was substantial (5,746,381), therefore I decided the most practical and efficient way to cover the data would be through a random sampling of the court cases. A power analysis was performed using G Power 3 to determine the most appropriate sample size for my study, resulting in a suggested sample size of about 314 cases. I ended up sampling 400 cases: 200 from Tennessee and 200 from Kentucky. The cases were randomly selected through the *LexisNexis* database. The results were selected from civil and criminal cases in Tennessee and Kentucky cases from the years 2000 through 2007. I did not include cases in my sample that were regarding lawyers being debarred and only included cases that fell into the civil or criminal category.

[57] *National Center for State Courts* , http://www.ncsc.org/About-us.aspx (accessed 2011).

In my results I included the year of a case, the court in which it was last heard, whether it was a civil or criminal case and then for simplicity the overall outcomes were reported as either affirmed or not affirmed; however, only appellate decisions that affirmed the trial court decision *in whole* are considered "affirmed" and all other outcomes, such as reversed in part/affirmed in part, reversed in whole, modified, and remanded, are labeled "not affirmed." I decided these variables were the most important to record because they all provide key information, which can help explain the outcome of a decision.

After compiling my raw data I then created a pivot table in which I separated the data in to three groups for Tennessee and Kentucky, criminal and civil, and affirmed and not affirmed. From the data in the pivot table I then performed a chi-squared test.

Pivot table 1.

			Affirmed/not affirmed		
KY/TN	Crimina	Data	0	1	Grand Total
0	0	Sum of KY/TN	0	0	0
		Count of Criminal/Civil	105	51	156
	1	Sum of KY/TN	0	0	0
		Count of Criminal/Civil	27	17	44
0 Sum of KY/TN			0	0	0
0 Count of Criminal/Civil			132	68	200
1	0	Sum of KY/TN	101	24	125
		Count of Criminal/Civil	101	24	125
	1	Sum of KY/TN	62	13	75
		Count of Criminal/Civil	62	13	75
1 Sum of KY/TN			163	37	200
1 Count of Criminal/Civil			163	37	200
Total Sum of KY/TN			163	37	200
Total Count of Criminal/Civil			295	105	400

Figure 1.1

CHAPTER 8

RESULTS

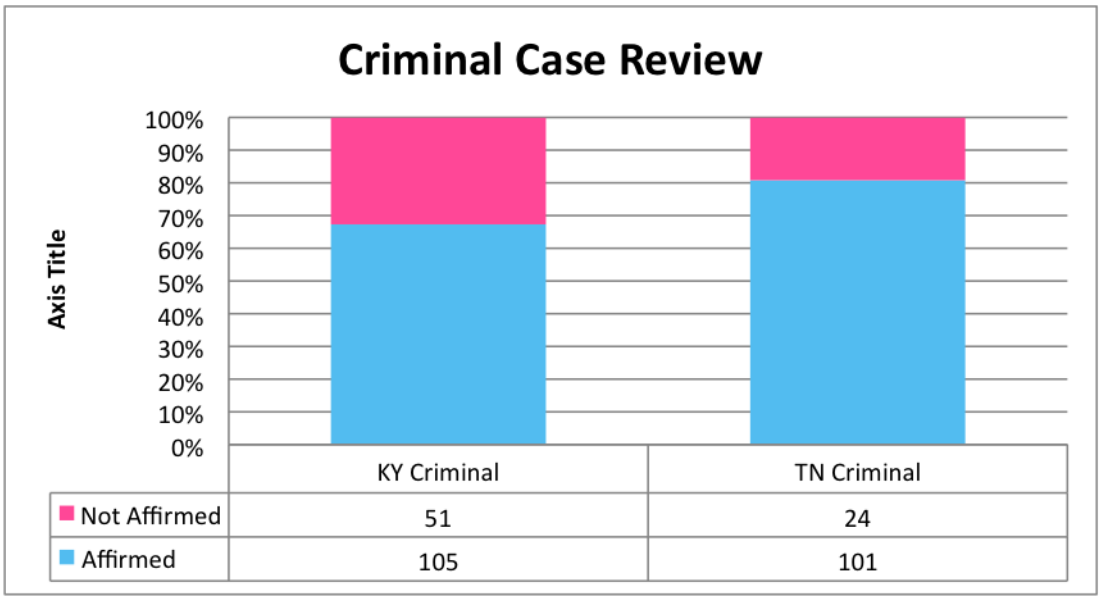

Figure 2.1

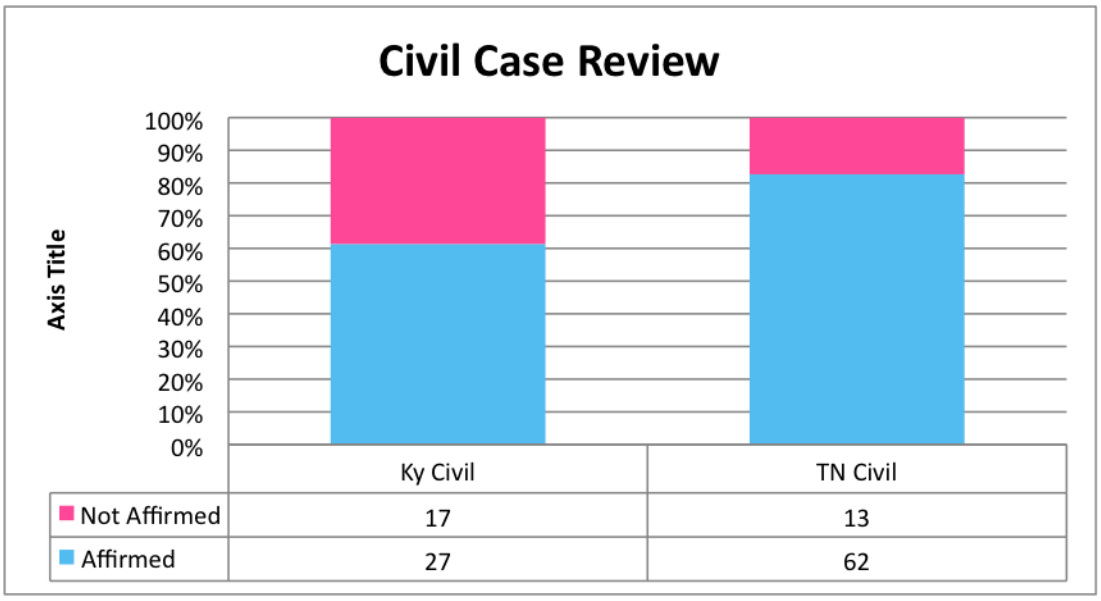

Figure 2.2

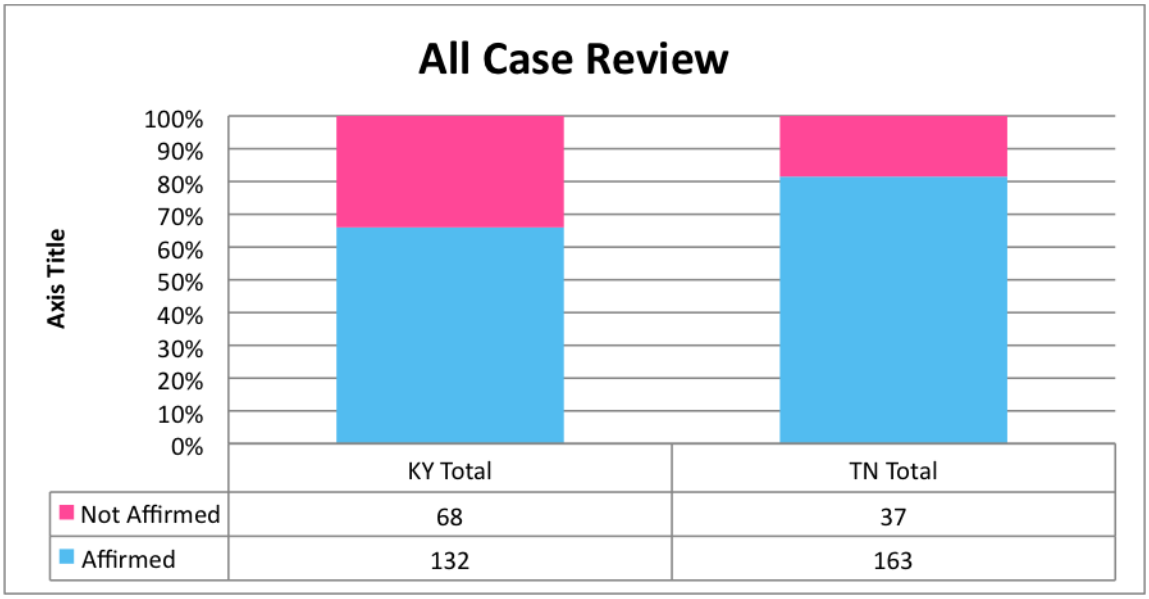

Figure 2.3

The results from the pivot table show a noticeable difference between the number of not affirmed cases and affirmed cases in Kentucky and Tennessee. There is an even greater difference between civil cases specifically between the two states when looking at the raw data, where Tennessee has considerably fewer not affirmed cases than Kentucky.

The results from my chi-squared goodness of fit test further showed the difference between observed and expected scores is at the .01 level (.00248) thus demonstrating a significant difference between the scores of Kentucky and Tennessee. I then compared Kentucky and Tennessee separately to the expected national average of state reversal rates of 32 percent. Kentucky's score of .54428 was not statistically significant and was similar to the national average. Tennessee's results were very significant and scored above the .001 level (.00004216).

This data therefore suggests that Tennessee is not only significantly different from Kentucky, but that it is also very significantly different from the national average of state reversal rates in that it has significantly fewer reversed cases.

CHAPTER 9

CONCLUSION

What is the reason for this discrepancy between Tennessee and its neighboring state and even all other states in the country? Based on my research and the literature, I think there is a strong case for the argument that Tennessee has a judicial selection system that results in higher quality judges and therefore leads to lower reversal rates and more efficient court system overall. Through my research I read the pros and cons of each side of the argument between Kentucky and Tennessee selection methods and overwhelmingly the electoral process had not only more possibility for error, but also more concrete evidence of error as well as pure abuse of the system. The Tennessee plan has a check for its system against cooking the books in its retention elections that allow the public to decide if a judge stays or goes usually after only two years into their term. My data analysis confirms these perceptions with a significant amount of concrete evidence.

What does this mean in the larger scheme of the debate that is raging across the country? It means that this isolated study provided data that can be built upon to expand the effects and results of judicial appointments and elections. As it stands now, I think this should draw the attention of Kentuckians to consider making some changes in their system. I think if Kentucky decided to switch from elections to an appointment system, similar to Tennessee's merit plan form, it would be likely they would see a positive

change in their court system. I would expect them to find more fair rulings the first time their case was heard, more qualified judges themselves, and overall a greater respect for the judicial branch. Respect and trust in the judiciary would be the most important outcome, for as stated previously the "American psyche… that judicial independence [is]…the backbone of the American democracy, the bulwark of the Constitution, and an indispensable element of our constitutional framework."[58]

If other states ran comparisons with their records against the national average for reversals than I think it would be beneficial to see where what states and where what methods of judicial selection fell. I also think major progress could be made at the state level if records were more closely examined. I was shocked that the court systems didn't keep their own data more logically recorded. When I called various branches on the state courts they would pass me on to the other court or to a different office either simply to evade the question or because they all genuinely thought some else had the data, when in reality it wasn't there.

An outside source sorts through judicial information where it is available but underutilized and for that I think the judicial system has paid a high price. The topic of judicial selection methods is one of importance and relevance to the whole judicial system because it is at the beginning. Every state judge must pay through some test whether it be through an election or an appointment or both to receive and maintain their position; wouldn't we want the most rigorous and efficient system possible so as to

[58] John D. Fabian, "The Paradox of Elected Judges: Tension in the American Judicial System," *Georgetown Journal of Legal Ethics* (Georgetown Journal of Legal Ethics) 15 (Fall 2001). 155.

receive the best candidates for the job? Just because a person was popularly voted into office does not mean they are qualified for the job. My data analysis supports this conclusion because between Tennessee, which requires more credentials and more checks and balances, and Kentucky, which has almost no credential requirements and very limited checks and balances, there is such a significant statistical difference that I believe suggests Tennessee has the superior results and therefore superior court system which all begins with the judicial selection process because a court can only be as strong as the judges on its bench.

However, if further research were to be conducted there could potentially be many factors that could explain the difference in reversal rates between the states. Kentucky could have suffered from a scandal in the executive branch that would make voters uncomfortable with appointments, or because of the way the counties are broken up in one state versus the other it might lend itself more towards elections. This is just one study and for any decision to made responsibly as many factors as possible must be considered when making it. The data is strong, but follow up research and other case studies will make the final case for one method over the other considerably more compelling.

Civil Cases Filed[59]

	2000	2001	2002	2003	2004	2005	2006	2007	Total
KY	267,300	269,003	282,578	220,102	217,090	221,084	269,003	249,467	1,952,284
TN	134,666	157,210	155,577	69,589	77,138	76,028	72,881	70,159	813,248

Criminal Cases Filed

	2000	2001	2002	2003	2004	2005	2006	2007	Total
KY	234,573	206,910	194,044	251,508	271,902	254,939	249,685	251,482	1,915,042

[59] Melissa T. Cantrell, Carol R. Flango and Karen Gillions Way, *State Court Caseload Statistics 2001*, Conference of State Court Administrators, the State Justice Institute, the Buerau of Justice Statistics, National Center for State Courts' Court Statistics Project (National Center for State Courts , 2001).

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TN	96,744	98,521	87,754	119,773	162,501	158,044	171,571	170,899	1,065,807

Figure 3.1

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